Supreme Court, U.S.
FILED

97 1033 DEC 15 1997

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DAVID L. SMITH,

Petitioner,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

3 1 PP

QUESTIONS PRESENTED FOR REVIEW

Whether the Tenth Circuit has arbitrarily deprived Mr. Smith of his statutory right to appeal and receive a full and fair review of Judge Nottingham's final orders imposing harsh and unjustified sanctions of approximately $25,000.00 against him, in violation of his First Amendment right to petition the government for a redress of grievances and his Fifth Amendment right to due process of law.

Whether these final orders have resulted in irreparable harm to Mr. Smith, who has been suspended from the practice of law since November 29, 1993, pending payment of more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the Tenth Circuit and the United States District Court for the District of Colorado, including those imposed against him by Judge Nottingham.

Whether since Mr. Smith is financially unable to pay these sanctions, he is being indefinitely excluded from the practice of law on an impermissible basis, i.e., on the basis of his inability to pay harsh and unjustified sanctions of more than $50,000.00, in violation of his Fifth Amendment due process and equal protection rights.

Whether since the unpublished sanction orders issued by Judge Nottingham are not judicial precedents under 10th Cir. R. 36.3., the Tenth Circuit's reliance on this Court's opinion in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994) to attempt to justify its issuance of unpublished orders and judgments refusing to vacate Judge Nottingham's unpublished sanction orders was clearly erroneous and contrary to law.

Whether this was especially true considering the devastating impact on Mr. Smith of the Tenth Circuit's refusal to vacate Judge Nottingham's unpublished sanction orders.

Whether under all the circumstances, the Tenth Circuit's fairness and impartiality might reasonably be questioned.

Whether the Tenth Circuit was obligated to disqualify itself from this case pursuant to 28 U.S.C. § 455(a) and Canon 3 of the ABA Code of Judicial Conduct.

Whether by failing or refusing to disqualify itself from this case, the Tenth Circuit has deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law.

Whether the Tenth Circuit has also so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by Judge Nottingham, as to call for an exercise of this Court's supervisory power; has decided important questions of federal law that have not been, but should be, settled by this Court; and has decided important federal questions in a way that conflicts with relevant decisions of this Court.

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CITATIONS OF OPINIONS AND ORDERS

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Dunkin v. Louisiana-Pacific Corporation, et al., Civil Action No. 92 N 243 (U.S. District Judge Edward W. Nottingham) (Order Filed on August 19, 1996).

Dunkin v. Louisiana-Pacific Corporation, et al., Case No. 96-1411 (10th Cir.) (Order Filed on July 28, 1997).

Dunkin v. Louisiana-Pacific Corporation, et al., Case No. 96-1411 (10th Cir.) (Order Filed on September 24, 1997).

JURISDICTION

The opinions and orders sought to be reviewed were entered on June 12, 1996, August 19, 1996, and July 28, 1997. Rehearing of the Tenth Circuit's (July 28, 1997) order was denied by order dated September 24, 1997.

The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review on writ of certiorari the opinions and orders in question is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Amend. 1, U.S. Consti.

Amend. 5, U.S. Consti.

28 U.S.C. § 455(a)

28 U.S.C. § 1291

10th Cir. R. 36.3.

Canon 3, ABA Code of Judicial Conduct

See the Appendix hereto for the full text of the pertinent portions of the constitutional provisions and statutes involved in the case.

Pro se attorney-petitioner David L. Smith ("Mr. Smith") hereby files his petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit:

I. STATEMENT OF THE CASE

On June 12, 1996, the Tenth Circuit issued its order and judgment affirming the memorandum opinion and order issued by United States District Judge Edward W. Nottingham on January 17, 1995. In his opening brief on appeal, Mr. Smith made the following arguments:

> (1) Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $4,541.25, and other harsh and unjustified sanctions, against Mr. Smith because of his and his client's refusal to sign the burdensome, oppressive and unconstitutionally overbroad confidentiality order proposed by opposing counsel;
>
> (2) Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $1,870.93, and other harsh and unjustified sanctions, against Mr. Smith for filing and pursuing a meritorious motion for reconsideration of a magistrate-judge's ruling on a discovery matter;

(3) Judge Nottingham abused his discretion or otherwise acted improperly by refusing to recuse himself from the case pursuant to 28 U.S.C. § 455(a), where his impartiality might reasonably be questioned under all the circumstances of the case;

(4) Judge Nottingham abused his discretion or otherwise acted improperly by addressing Mr. Smith's client directly and accusing him of incompetence and unprofessional behavior in an attempt to induce or intimidate his client into firing him as her attorney, or to otherwise interfere with their attorney-client relationship;

(5) Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $18,085.83, and other harsh and unjustified sanctions, against Mr. Smith for filing and pursuing alleged "frivolous" appeals of his (Judge Nottingham's) immediately payable sanction orders;

(6) Judge Nottingham abused his discretion or otherwise acted improperly by applying D.C.COLO.LR 83.6P. (which is unconstitutional on its face) to stay Mr. Smith's client's civil rights case and to vacate her jury trial date "pending resolution of Plaintiff's counsel's status";

(7) Judge Nottingham abused his discretion or otherwise acted improperly by refusing to dismiss the case on the terms and conditions agreed to by the parties and their attorneys in their settlement and stipulation of dismissal, including their agreement that the sanctions imposed against Mr. Smith would be vacated and/or dismissed with prejudice nunc pro tunc to the date of their imposition.

The Tenth Circuit issued its (June 12, 1996) order and judgment affirming Judge Nottingham's (January 17, 1995) memorandum opinion and order without addressing the arguments made by Mr. Smith in his opening brief on appeal or giving any reasons for its decision.

On August 19, 1996, Judge Nottingham issued his order requiring Mr. Smith "to pay the sanctions imposed in this case within ten days of the date of this order." This order was issued even though these sanctions had already been settled by the parties and their attorneys in a legally binding settlement agreement in which Mr. Smith had been released from payment of these sanctions to the opposing party as a part of the consideration for the settlement of the underlying case.

On July 28, 1997, the Tenth Circuit issued its order and judgment affirming Judge Nottingham's (August 19, 1996) order. In his opening brief on appeal, Mr. Smith made the following arguments:

(1) By issuing his orders imposing immediately payable attorney fees and costs of approximately $25,000.00, and other harsh and unjustified sanctions, against Mr. Smith, Judge Nottingham, who is demonstrably biased, engaged in judicial misconduct which deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law;

(2) Mr. Smith was therefore entitled, as a matter of Fifth Amendment due process of law, to have his appeal of this judicial misconduct heard and decided by a fair and impartial court of appeals;

(3) Because of its previous orders and judgments imposing harsh and unjustified sanctions and discipline against Mr. Smith, and its refusal to provide a statement of reasons (if any), addressing the issues raised and briefed by Mr. Smith on appeal, for its order and judgment affirming the orders issued by Judge Nottingham imposing immediately payable attorney fees and costs of approximately $25,000.00, and other harsh and unjustified sanctions, against Mr. Smith, the Tenth Circuit's fairness and impartiality might reasonably be questioned;

(4) The Tenth Circuit was therefore obligated to disqualify itself from this case pursuant to 28 U.S.C. § 455(a);

(5) By failing or refusing to disqualify itself from this case, the Tenth Circuit again deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law;

(6) The Tenth Circuit also so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such procedure by Judge Nottingham, as to call for the exercise of the Supreme Court's power of supervision;

(7) Judge Nottingham committed reversible error, abused his discretion or otherwise acted contrary to the fair and impartial administration of justice by issuing his (August 19, 1996) order requiring Mr. Smith to pay the harsh and unjustified sanctions of approximately $25,000.00 previously imposed against him to the opposing party within ten days, even though these sanctions have already been settled by the parties and their attorneys in a legally binding settlement agreement in which Mr. Smith has been released from payment of these sanctions to the opposing party as a part of the consideration for the settlement of the underlying case;

> (8) Judge Nottingham has thus sadistically placed Mr. Smith in the untenable position of having to obey his transparently invalid order to pay these harsh and unjustified sanctions to the opposing party within ten days or run the risk of being cited for contempt or charged with a disciplinary violation.

The Tenth Circuit issued its (July 28, 1997) order and judgment affirming Judge Nottingham's (August 19, 1996) order without addressing the arguments made by Mr. Smith in his opening brief or giving any reasons for its decision.

On September 24, 1997, the Tenth Circuit issued its order denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (July 28, 1997) order and judgment without addressing the arguments raised by him therein or giving any reasons for its decision.

II. ARGUMENT

By (1) issuing its (June 12, 1996) order and judgment affirming Judge Nottingham's (January 17, 1995) memorandum opinion and order without addressing the arguments made by Mr. Smith in his opening brief on appeal or giving any reasons for its decision, (2) issuing its (July 28, 1997) order and judgment affirming Judge Nottingham's (August 19, 1996) order without addressing the arguments made by Mr. Smith in his opening brief or giving any reasons for its decision, and (3) issuing its (September 24, 1997) order denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (July 28, 1997) order and judgment without addressing the arguments

raised by him therein or giving any reasons for its decision, the Tenth Circuit has arbitrarily deprived Mr. Smith of his statutory right to appeal and receive a full and fair review of Judge Nottingham's final decisions imposing harsh and unjustified sanctions of approximately $25,000.00 against him, in violation of his First Amendment right to petition the government for a redress of grievances and his Fifth Amendment right to due process of law. See 28 U.S.C. § 1291 (which provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court"); see also NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("[a]nd under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964); United Mine Workers v. Illinois, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). These final decisions have resulted in irreparable harm to Mr. Smith, who has been suspended from the

practice of law since November 29, 1993, pending payment of more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the Tenth Circuit and the United States District Court for the District of Colorado, including those imposed against him by Judge Nottingham. See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994). Further, since Mr. Smith is financially unable to pay these harsh and unjustified sanctions, he is being indefinitely excluded from the practice of law on an impermissible basis, i.e., on the basis of his inability to pay harsh and unjustified sanctions of more than $50,000.00, in violation of his Fifth Amendment due process and equal protection rights. See, e.g., Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970); Morris v. Schoonfield, 399 U.S. 508, 90 S.Ct. 2232, 26 L.Ed.2d 773 (1970); Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971); Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); see also Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951). Finally, since the unpublished sanction orders issued by Judge Nottingham are not judicial precedents under 10th Cir. R. 36.3. (which provides that "[u]npublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel"), the Tenth Circuit's reliance on this Court's opinion in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994) to attempt to justify its issuance of unpublished orders and judgments refusing to vacate the unpublished sanction orders issued by Judge Nottingham was clearly erroneous and

contrary to law. This was especially true considering the devastating impact on Mr. Smith of the Tenth Circuit's refusal to vacate Judge Nottingham's unpublished sanction orders.

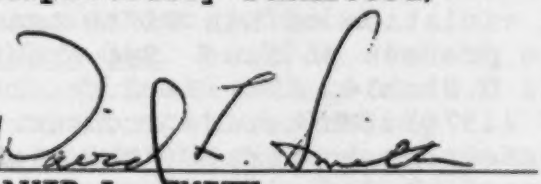
Under all the circumstances, the Tenth Circuit's fairness and impartiality might reasonably be questioned. The Tenth Circuit was therefore obligated to disqualify itself from this case pursuant to 28 U.S.C. § 455(a) (which provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned") and Canon 3 of the ABA Code of Judicial Conduct (which provides that "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"). See also Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). By failing or refusing to disqualify itself from this case, the Tenth Circuit has deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law. See Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decisionmaker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due

process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decisionmaker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (nor may a judge or other ostensibly impartial decisionmaker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). The Tenth Circuit has also so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by Judge Nottingham, as to call for an exercise of this Court's supervisory power; has decided important questions of federal law that have not been, but should be, settled by this Court; and has decided important federal questions in a way that conflicts with relevant decisions of this Court.

III. CONCLUSION

Mr. Smith requests this Court to grant his petition for a writ of certiorari, and such other and further relief as may be just under the circumstances.

Respectfully submitted,



DAVID L. SMITH

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APPENDIX

Dunkin v. Louisiana-Pacific Corporation, et al., Case No. 95-1087 (10th Cir.) (Order and Judgment Filed on June 12, 1996). A-2

Dunkin v. Louisiana-Pacific Corporation, et al., Civil Action No. 92 N 243 (U.S. District Judge Edward W. Nottingham) (Order Filed on August 19, 1996). A-5

Dunkin v. Louisiana-Pacific Corporation, et al., Case No. 96-1411 (10th Cir.) (Order Filed on July 28, 1997). A-6

Dunkin v. Louisiana-Pacific Corporation, et al., Case No. 96-1411 (10th Cir.) (Order Filed on September 24, 1997). A-9

Amend. 1, U.S. Consti. A-11

Amend. 5, U.S. Consti. A-12

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Canon 3, ABA Code of Judicial Conduct A-16

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN,	)	[June 12, 1996]
	)	
Plaintiff,	)	
	)	
v.	)	No. 95-1087
	)	(D.C. No. 92-N-243
LOUISIANA-PACIFIC CORPORATION; JAMES BELDIN; DOUGLAS EDDINS,	)	(D. Colo.)
	)	
Defendants-Appellees,	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	

ORDER AND JUDGMENT[1]

Before BALDOCK, HOLLOWAY, and BRORBY, Circuit Judges.

[1]This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Attorney-appellant David L. Smith appeals sanction orders entered against him by the district court and that court's refusal to vacate those orders following the parties' settlement of the underlying lawsuit. Plaintiff-appellant Geana J. Dunkin argues that the district judge should have recused, that he interfered with the attorney-client relationship, and that he abused his discretion when he stayed her case pending the resolution of her attorney's disciplinary status.

We have reviewed the record in this case and the briefs of the parties. We find that the district court was well within its discretion in imposing sanctions against Mr. Smith. Mr. Smith's argument that previous panels to this court were not frivolous has been foreclosed by previous panels of this court. See In re Smith, 10 F.3d 723, 724 (10th Cir. 1993), cert. denied, 115 S.Ct. 53 (1994). Ms. Dunkin's arguments regarding the district court's refusal to recuse, its alleged interference with the attorney-client relationship, and its stay of her case became moot when the parties settled their underlying dispute.

Finally, the district court did not err in refusing to vacate the previously imposed sanctions. See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S.Ct. 386, 393 (1994). This case does not present the exceptional circumstances which, in some instances, can support the vacatur of previous sanctions. See id.; see also Oklahoma Radio Assocs. v. FDIC, 3 F.3d 1436, 1444-45 (10th Cir. 1993).

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

Wade Brorby
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Civil Action No. 92 N 243 [August 19, 1996]

GEANA J. DUNKIN,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, and DOUGLAS EDDINS,

Defendants.

ORDER

This matter is before the court on the mandate of the United States Court of Appeals for the Tenth Circuit, filed in this court on August 19, 1996. The court of appeals affirmed this court's imposition of sanctions upon Attorney David L. Smith. In order to establish a date certain for payment of the sanctions, it is

ORDERED that Mr. Smith shall pay the sanctions imposed in this case within ten days of the date of this Order.

Dated this 19th day of August, 1996.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN,	)	[July 28, 1997]
	)	
Plaintiff,	)	
	)	
v.	)	No. 96-1411
	)	(D.C. No. 92-N-243
LOUISIANA-PACIFIC CORPORATION; JAMES BELDIN; DOUGLAS EDDINS,	)	(D. Colo.)
	)	
Defendants-Appellees,	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	

ORDER AND JUDGMENT[2]

[2]This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before KELLY and HENRY, Circuit Judges, and DOWNES,[3] District Judge.

After examining appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

On receipt of this court's mandate arising from our affirmance of the district court's imposition of sanctions against Mr. Smith, see Dunkin v. Louisiana-Pacific Corp., No. 95-1087 (10th Cir. June 12, 1996), cert. denied, 117 S.Ct. 435 (1996), the district court entered an order establishing a date certain for payment of the sanctions. Mr. Smith appeals from that order, but does not raise any issues relating to that order per se. Instead, he raises arguments against the imposition of sanctions that he raised in the prior appeal. He also has moved for this court's recusal from this matter and for en banc consideration of recusal. These motions were denied in orders filed on November 29 and December 27, 1996. Consideration of the remaining issues is barred by law of the case. See Rohrbaugh v. Celotex Corp., 53 F.3d 1181, 1183 (10th Cir. 1995).

AFFIRMED.

---

[3]The Honorable William F. Downes, District Judge, United States District Court for the District of Wyoming, sitting by designation.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN,	)	[September 24, 1997]
Plaintiff,	)	
v.	)	No. 96-1411
LOUISIANA-PACIFIC CORPORATION; JAMES BELDIN; DOUGLAS EDDINS,	)	
Defendants-Appellees,	)	
DAVID L. SMITH,	)	
Attorney-Appellant.	)	

ORDER
Filed September 24, 1997

Before KELLY and HENRY, Circuit Judges, and DOWNES,[4] District Judge.

Appellant's petition for rehearing is denied by the panel that rendered the decision.

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[4]The Honorable William F. Downes, District Judge, United States District Court for the District of Wyoming, sitting by designation.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by:
Deputy Clerk

Amendment I of the Constitution of the United States provides in pertinent part as follows:

> Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

Amendment V of the Constitution of the United States provides in pertinent part as follows:

> **No person shall . . . be deprived of life, liberty, or property, without due process of law.**

28 U.S.C. § 455(a) provides as follows:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 1291 provides as follows:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

10th Cir. R. 36.3. provides as follows:

> Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel. Citation of unpublished orders and judgments is not favored. Nevertheless, an unpublished decision may be cited if it has persuasive value with respect to a material issue that has not been addressed in a published opinion and it would assist the court in its disposition. A copy of the decision must be attached to the brief or other document in which it is cited, or, if cited in oral argument, provided to the court and all other parties.

Canon 3 of the ABA Code of Judicial Conduct provides in relevant part as follows:

. . .

> **A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . .**